

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUAY DAWOD,

Defendant-Appellant.

UNPUBLISHED

July 7, 2000

No. 213630

Wayne Circuit Court

LC No. 97-501864

Before: Murphy, P.J., and Collins and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), and two counts of assault with intent to commit criminal sexual conduct, MCL 750.520g; MSA 28.788(7). Defendant was sentenced to concurrent terms of two to fifteen years' imprisonment for the third-degree criminal sexual conduct conviction and one to ten years' imprisonment for each assault with intent to commit criminal sexual conduct conviction. We affirm.

Defendant first contends that the prosecutor's remarks in closing argument constituted error mandating reversal. We disagree. This Court reviews issues of prosecutorial misconduct on a case by case basis, the remarks of the prosecutor to be evaluated in context to determine if defendant was denied a fair and impartial trial. *People v Noble*, 238 Mich App 647, 660; ___ NW2d ___ (1999). However, absent a miscarriage of justice, appellate review of alleged instances of prosecutorial misconduct is precluded if the defendant failed to make a timely objection because the trial court is otherwise deprived of the opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant, a Chaldean immigrant, contends that the prosecutor improperly referenced his ethnicity. He asserts that the prosecutor attacked his credibility by implying that witnesses of similar heritage were purposely uncooperative with investigating police officers in order to help defendant. At trial, the ethnicity of defendant and others was elicited in the following manner: Defendant testified that he is Chaldean and had been in the United States for four years prior to trial. Defendant also testified that complainant's coworker at the market where the alleged assault occurred, Sam, is a friend of his

and is also an Iraqi immigrant. Finally, defendant testified that the Chaldean community is very close knit and stated that Chaldeans help each other out.

In addition, evidence was introduced at trial which demonstrated that defendant's acquaintances were, at a minimum, uncooperative in the investigation, and may have actually obstructed the investigation. Specifically, Officer Michael Gerard interviewed Sam and the store owner, Freddy, who is also Chaldean. Both denied that there were surveillance cameras in the store. However, it was later determined that the market was, in fact, equipped with surveillance cameras. Officer Jeffrey Watson also testified that Sam was uncooperative during his investigation and did not inform him of the presence of surveillance cameras in the market. Moreover, despite their purported friendship, Sam could not provide defendant's last name.

A prosecutor may make comments that are supported by the evidence. *Id.* at 686. In this case, the contested statements were all based on credible evidence introduced at trial. Accordingly, while we are disturbed that the prosecutor felt the need to reference the Chaldean heritage of these principal witnesses in making the point that defendant's acquaintances were uncooperative, we find no error mandating reversal under the circumstances. It is clear that any prejudicial effect stemming from the prosecutor's unnecessary references to ethnicity could have been cured by a cautionary instruction had defendant not failed to object to the alleged misconduct at trial. *Id.* at 687. On this record, we conclude that defendant was not denied a fair and impartial trial.

Defendant next contends that the trial court erred in not granting him a new trial based on the ethnic remarks of the prosecutor. A new trial may be granted on a ground which would support reversal on appeal or because the verdict resulted in a miscarriage of justice. MCR 6.431(B); *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997); see also MCL 770.1; MSA 28.1098. Because the prosecutor's comments were based on permissible inferences drawn from the evidence and defendant was not denied his right to a fair and impartial trial, he is not entitled to a new trial. The trial court did not abuse its discretion in denying defendant's motion for a new trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Finally, defendant contends that the trial court erred in not allowing defense counsel to argue that complainant reported an indecent exposure complaint, rather than a rape complaint, when she called the police. We again disagree.

Defense counsel may not make a statement of fact to the jury that is not supported by the evidence or constitutes an improper use of the evidence. *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). Here, the trial court correctly ruled that complainant never testified that she informed the police she had been the victim of indecent exposure. Rather, two of the investigating police officers testified that they were told by the dispatcher that they were to respond to a possible indecent exposure complaint. The statement cannot be attributed to the complainant, especially given the absence of testimony from the dispatcher. Accordingly, the trial court did not abuse its discretion in restricting defense counsel's closing argument to relevant, admissible evidence.

Affirmed.

/s/ William B. Murphy

/s/ Jeffrey G. Collins

/s/ Donald S. Owens